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In The United States Supreme Court

Larry David Smith

Plaintiff - Appellant

V.

James F. Dwyer, ET AL.

Defendants - Appellees

State of Alabama

County of Escambia

Affidavit in

Support of Motion To

Proceed in Forma,

PAUPERIS

ss.:

Larry David Smith, being duly Sworn, deposes and says  
(1-) I am Plaintiff in the Above-Titled Action.  
(2-) I believe I am entitled and intend to bring  
this Action in the United States Supreme Court  
Against the above-named defendants.

(3-) ~~Because~~ I believe that I am entitled to the Redress Sought  
in this Action

(4-) ~~Because~~ Because of my Poverty, I am without funds and  
unable to pay the Costs of this Action, to give Security  
therefor, or to employ an Attorney.

Signature: Larry David Smith

Subscribed and Sworn To before me this 26 day,  
of April 1977

L. L. J. J. J.  
Notary Public

In The United States Supreme Court

GARY DAVID SMITH  
Plaintiff - Appellant  
v.

JAMES F. DYGMON, ET. AL.

Defendants - Appellees

Motion For  
Appointment of  
Counsel

Plaintiff Move in This Court for an order  
Appointing Hon. Guy Sparks 409 Commercial  
National Bank Bldg Anniston, Alabama, 36401, a  
Member of the Alabama Bar, To Represent  
Plaintiff because Plaintiff cannot afford to  
employ an Attorney. This motion is based on  
Plaintiff's Affidavit in Support of Plaintiff's  
Motion for leave to proceed in forma pauperis  
and for Appointment of Counsel. Legal Authority  
for Appointment and Compensation of Counsel is  
28 U.S.C. Sec. 1915 (d) and 18 U.S.C. Sec. 3006A (g),  
as interpreted in McClain v. Mansen 343 F. Supp.  
382 (D. Conn 1972)

GARY DAVID SMITH  
P.O. Box 37  
Holman Sta. AL. 36503  
IN PROPRIA PERSONAM.

In The United States Supreme Court

GARY DAVID SMITH, PLAINTIFF - APPELLANT  
VS.

JAMES F. DYGMON, ET. AL.

Defendants - Appellees

CASE NO: \_\_\_\_\_

APPLICATION FOR WRIT OF HABEAS CORPUS  
TO THE U.S. COURT OF APPEALS, FIFTH CIRCUIT  
CASE NO: 77-8141

Affidavit Oath in forma pauperis

Application Brief of Plaintiff - Appellant

GARY DAVID SMITH  
GARY DAVID SMITH, IN PRO SE.  
P.O. Box 37  
Holman Sta. AL. 36503

## ISSUES PRESENTED

1. THAT APPELLATE COURT ERRED IN REFUSING TO GRANT APPEAL IN FORMA PAUPERIS IN HABEAS CORPUS PROCEEDING.
2. THAT THE DISTRICT AND APPELLATE COURTS ERRED IN FAILING TO REVIEW THE HABEAS CORPUS AS IT WAS IMPROPERLY DENTED?
3. THAT APPELLATE COURT ERRED IN REFUSING TO REVIEW THE PROCEEDINGS UPON FACE OF THE RECORD.

## — PROPOSITIONS OF LAW. —

### — I —

IT IS ERROR TO DENY FORMA PAUPERIS WHEN IT HAS BEEN ESTABLISHED THAT APPELLANT IS INDIGENT.  
28 U.S.C. 1915 ET. SEQ. 18 U.S.C. 3006 A (4).

ADICKES V. E.T. DUPONT DE NEMOURS 335 U.S. 331, 339 (1948)

### II

IT IS ERROR TO DENY REVIEW WHEN IT IS BEYOND DOUBT THAT STATE REMEDIES HAVE BEEN EXHAUSTED.

28 U.S.C. 2241-2255; U.S. CONSTITUTION AMENDMENT 14.

### III

IT IS ERROR FOR APPELLATE COURT TO REFUSE TO REVIEW CASE WHEN THE RECORDS PROVE IT AS THE LAST RESORT.

U.S. CONST. AMD 14.



### Argument.

When one has proven beyond doubt that there is no funds, means or collateral available to give security for the costs of such proceedings, and legitimate grounds have been assigned as to why review should be granted. Then the Court would ERR in failing to accept the case for review.

The assignment of grounds were wholly provable by the record, both upon face and in actuality. This is predicated upon the rulings in: Smith v. State, 57 Ala. App. 164, 326 So. 2d 692 (1975) Cert. denied 295 Ala — 326 So. 2d 695 (1976)

Once state remedies have been exhausted there is no alternative but to seek Habeas Corpus 28 U.S.C. 2241-2255.

Further once case has been submitted to State Supreme Court, there is no reason or requirement to go back to the state level.

Fay v. Noia 372 U.S. 391, 399 (1963)

Brown v. Allen 344 U.S. 443 (1953)

Thomas v. Cunningham 313 F.2d 934 (1963)

Evans v. Cunningham 335 F.2d 491 (1964)

Hayes v. Boston 336 F.2d 31 (1964)

Hutchins v. Dunbar 328 F.2d 111 (1964)

Curtis v. Boeger 331 F.2d 675 (1964)

Even the state admitted that Plaintiff-Appellant had exhausted all state remedies. In state's response on p. 2 last sentence of Sec. II states: "Clearly, the petitioner (Plaintiff) has exhausted his state remedies." This proves that the Appellate Court erred in failing to grant review.

Plaintiff being a layman therefore asks the Honorable Court to subpoena the records and survey them for the facts as are readily apparent therein.

Respectfully Submitted,

DATED: April 26 1977.

Larry D. Smith

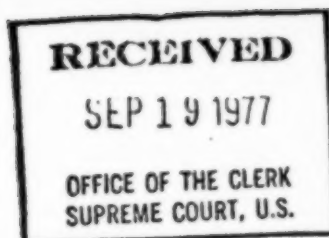
Carey David Smith, In Pro. Se.

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AC.

IN THE  
SUPREME COURT OF THE UNITED STATES



OCTOBER TERM, 1976

NO. 76-6799

ORIGINAL COPY

GARY DAVID SMITH,  
PETITIONER

VS.

JAMES F. DIGMON, WARDEN,  
RESPONDENT

*Rep's Brief in opposition*

BRIEF AND ARGUMENT  
IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

WILLIAM J. BAXLEY  
ATTORNEY GENERAL OF ALABAMA

DAVID W. CLARK  
ASSISTANT ATTORNEY GENERAL  
STATE OF ALABAMA

ELLIS D. HANAN  
ASSISTANT ATTORNEY GENERAL  
STATE OF ALABAMA

COUNSEL FOR RESPONDENT

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IN THE  
SUPREME COURT OF THE UNITED STATES

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NO. 76-6799

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GARY DAVID SMITH,  
PETITIONER  
VS.  
JAMES F. DIGMON, WARDEN,  
RESPONDENT

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BRIEF AND ARGUMENT  
IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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BRIEF AND ARGUMENT  
FOR RESPONDENT

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EARLIER OPINIONS IN THIS CASE

The affirmance of the convict's conviction is  
reported as:

Smith v. State, 57 Ala. App. 164, 326 So. 2d 692 (1975).

The denial of certiorari by the Alabama Supreme Court is reported as:

Smith v. State, 295 Ala. \_\_\_\_\_, 326 So. 2d 695 (1975).

The denial of the writ of habeas corpus by the United States District Court for the Northern District of Alabama is submitted as Appendix "D" to this brief.

The denial of a certificate of probable cause to appeal by the District Court is submitted as Appendix "E" to this brief.

So far as the Respondent knows, the Petitioner has neither sought nor received an order from the United States Court of Appeals for the Fifth Circuit granting or denying a certificate of probable cause to appeal.

#### JURISDICTION

The Petitioner contends that this Honorable Court maintains jurisdiction of the cause under 28 U. S. C. 2241-2255 and the Fourteenth Amendment to the United States Constitution.

#### QUESTIONS PRESENTED

1. Does a complaint by a State prisoner that incident to his trial in State court the trial judge allowed the convict's alibi evidence to be reread to the jury at their request present a Federal question within the meaning of 28 U. S. C. 2254 (a)?

2. Does a claim by a State prisoner convicted of rape that the prosecutrix's testimony concerning penetration was not corroborated present a Federal question within the meaning of 28 U. S. C. 2254 (a)?

3. Does a District Court err in denying a certificate of probable cause to appeal to a State prisoner who was denied a writ of habeas corpus on a petition that obviously presented no Federal question?

#### CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent specifically denies that this case involves any provision of the United States Constitution. However, the Petitioner is making his general claim under the Fourteenth Amendment of the United States Constitution.



### STATEMENT OF THE CASE

On January 10, 1977, the convict, a State prisoner, petitioned the United States District Court for the Northern District of Alabama for a writ of habeas corpus claiming that his United States Constitutional rights were violated by his imprisonment. The convict claimed that:

1. The State trial judge had erred in allowing the convict's alibi evidence to be reread to the jury at their request, and

2. The convict was convicted of rape on the uncorroborated testimony of the prosecutrix, as to penetration. On January 10, 1977, the District Court issued a show cause order to the State of Alabama. See Appendix "A".

The State's return moved to dismiss the petition, because neither of the convict's claims raised a Federal question within the meaning of 28 U. S. C. 2254 (a). See Appendices "B" and "C".

On February 11, 1977, the District Court denied the writ, finding that the petition presented no Federal question. See Appendix "D".

On February 23, 1977, the District Court denied the convict a certificate of probable cause to appeal. See Appendix "E".

So far as the Respondent knows, the convict has never applied to the Fifth Circuit for a certificate of probable cause to appeal.

### ARGUMENT

The Respondent will not take this Honorable Court's valuable time arguing the obvious. It is obvious that the petition presented no Federal question. (Should this Court wish argument on this point, the Respondent submits its memorandum in the District Court as Appendix "C" to this Brief.) It is equally obvious that the District Court correctly denied the writ and the certificate of probable cause to appeal.

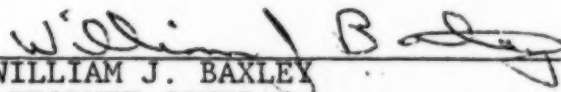
The instant petition is directed to the United States Court of Appeals for the Fifth Circuit, but so far as the Respondent knows, the Fifth Circuit has never issued an order. There is, therefore, nothing to review.

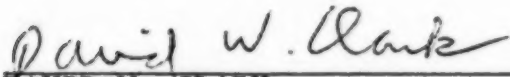


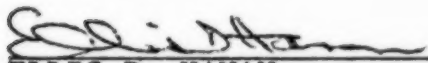
CONCLUSION

In conclusion, the Respondent respectfully submits that the writ is due to be denied and prays that the writ be denied.

Respectfully submitted,

  
WILLIAM J. BAXLEY  
ATTORNEY GENERAL  
STATE OF ALABAMA

  
DAVID W. CLARK  
ASSISTANT ATTORNEY GENERAL  
STATE OF ALABAMA

  
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